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No. 84-773

IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL BENDER, et al.,
Petitioners

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT TO FILING

Counsel for Petitioners and Respondents have consented to the filing of the within brief by the National School Boards Association. Confirming letters will be filed with the Court.

Respectfully submitted,

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THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITION FOR A
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INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of

Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The subject of whether public schools must or may grant "equal access" to student-initiated religious organizations is a controversial one among school board members and the citizens in the communities in which their school districts are located. Because of the difference of opinion among its membership as to whether student religious groups should be allowed to meet in the public schools,

NSBA has no policy on the subject. In the event this Court grants certiorari in this case, NSBA will not file a brief on the merits.

Policy differences aside, school board members across the country need guidance from this Court as to the legal question of whether they have any discretion in this matter. As the law now stands, their only safe alternative is to cease extracurricular activities altogether in order to assure that none of the conflicting legal authorities are violated.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the recently passed Equal Access Act, Pub. L. No. 98-377, Stat. 98-1302 (1984).

II. The decision below conflicts with other federal court decisions on the subject.

I. THE DECISION CONFLICTS WITH THE EQUAL ACCESS ACT.

On August 11, 1984, less than three weeks after the decision in the case at bar, President Reagan signed into law the Equal Access Act, Title VIII of P.L. 98-377.

That Act prohibits a recipient of federal financial assistance which has a "limited open forum" from discriminating against any secondary school students "who wish to conduct a meeting .... on the basis of the religious, political, philosophical, or other content of the speech at such meeting." Id at Sec. 1(a). A school operates a "limited open forum" if it allows "noncurriculum

related student groups to meet on school premises during noninstructional time." Id at Sec. 1.(b).

As noted above, the Equal Access Act prohibits discrimination against religious meetings if the meetings are held in a "limited public forum." That forum is present if the meetings meet the following three requirements: (1) voluntary and student-initiated; (2) noncurriculum related; and (3) held during noninstructional time. Since all three requirements are met in the instant case, the decision below conflicts with the Act.

The decision below found that, in creating the activities period, the school board created a "limited public forum" because: First, the school district left the subject matter of the

meetings entirely to the students with faculty acting only as monitors. Petition for Certiorari Appendix at 8a and 26a; Second, the board did not limit the content to curriculum related subjects, Id at 19a; and Third, the meetings were held before the beginning of class instruction, Id at 8a.

The debate on the Equal Access Act in both the House and the Senate attempted to define the third element so as to exclude Williamsport's activities period from the Act's coverage. However, given the clear language of the Act which defines "noninstructional time" as that "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends," these attempts to distinguish Williamsport cannot stand.

As was pointed out by Senator Denton, one of the sponsors of the Act:

> "[I]f the school allows noninstructional periods before or after actual classroom instruction -- which is the term used -- sometime during the day, then the school cannot discriminate against student-initiated groups who wish to meet voluntarily at that time, for example, during lunch periods, open activity periods, and in schools with staggered schedules where students are free to meet. I am willing to let that be subject to interpretation in the future. But what it says is actual classroom instruction. I have heard the term 'school day' thrown around in senatorial comment today but that is not what this bill says."

After the Act was signed by the President, the Petitioners requested the Third Circuit Court of Appeals to reconsider their decision in light of its potential conflict with the Act. The court denied that petition. Petition for Certiorari Appendix at 64a.

Amicus urges this Court, at the least, to remand this case back to the court of appeals with direction to determine whether the Equal Access Act can be distinguished from the facts here and, if not, to reconsider its decision in light of the Act.

It is unfair to school districts across the country to force them to subject themselves to liability either by allowing religious groups to meet, thereby subjecting themselves to charges of establishment of religion, or by refusing to allow them to meet and waiting for suits by student religious groups.

It should be noted that this dilemma not only implicates school districts but also has personal financial implications for individual school officials.

Students who are refused the right to meet because of an attempt to avoid charges of establishment of religion, could be awarded damages and attorneys fees, under 42 U.S.C. 1983 and 1988, against both the school board and individual school officials on the theory that the officials have deprived students of their rights guaranteed by the Equal Access Act.

II. THE DECISION CONFLICTS WITH OTHER FEDERAL COURT DECISIONS

A. Widmar v. Vincent.

Until its decision in Widmar v. Vincent, 454 U.S. 263 (1981), Supreme Court decisions on the question of prayer in the public schools were quite clear. See, eg, McCollum v. Board of Education, 333 U.S. 203 (1948) (religion classes as part of school curriculum); Engel v.

Vitale, 370 U.S. 421 (1962)(reciting in classrooms prayer written by state); Abington School District v. Schemp, 374 U.S. 203 (1963) (scripture reading and reciting Lord's Prayer in classrooms).

Prior to 1981 school boards could feel safe in denying the use of school facilities for religious meetings, even if other student groups were allowed to meet.

After Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) held that students have a free speech right in the classroom and Widmar v. Vincent, supra, held that religious speech is equally protected by the first amendment, school officials became more uncertain as to their obligations with regard to the use of school facilities by religious groups.

Although courts have distinguished Widmar on the basis of an "impressionable child" theory or for other reasons, nevertheless Widmar remains to support the Congress in its passage of the Equal Access Act and to support lawsuits by religious groups which continue to urge the opening of schools to their meetings.

B. Federal circuit decisions do not resolve the present issue.

Courts that have reached decisions contrary to Widmar, supra, have done so on the basis of three different rationales: 1) the presence of a religious purpose; 2) the absence of a public forum in public secondary schools; and 3) the impressionability of pre-college age students.

1. The presence of a religious purpose.

In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669

F.2d 1038, reh'g. denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 103 S.Ct. 800 (1983), the Fifth Circuit found an establishment of religion because the board policy allowing students to gather before and after school for a variety of purposes, including religious ones, was designed to bring religion into the schools. The court noted that the Lubbock School District had engaged in certain religious practices such as scripture reading over the public address system, teacher led classroom prayer and Bible distribution since 1971. Thus, the court found that the policy failed the first test, i.e., secular purpose, of the three prong analysis established in Lemon v. Kurtzman, 403 U.S. 602 (1971).

Recently the Eleventh Circuit pointed to the school district's overall

practice of supporting religious activities such as religious assemblies and signs and announcements of church sponsored events as an important consideration in upholding the trial court's grant of a preliminary injunction prohibiting the district from permitting a student religious group to meet on school property after school hours under faculty supervision. Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984). The court cautioned, however, that in evaluating the application for a permanent injunction, the district court should assess whether the district has an "equal access" policy, the extent of faculty sponsorship and other factors relating to the creation of a perception in the minds of the students that the school district is either "supporting" or merely "accommodating" religion.

Clearly, the presence of a religious purpose does not apply in the instant case, there being no contention that the Williamsport School District has a history of supporting religion that would taint a policy to allow student religious groups to meet. If Williamsport School District were to adopt such a policy, it would most certainly satisfy the first part of the Lemon test. Thus this distinction cannot serve as a basis for resolving the conflict created between the Third Circuit's decision and the Equal Access Act and this Court's ruling in Widmar.

2. Absence of a public forum.

The Fifth Circuit in Lubbock, supra, and the Second Circuit in Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), cert. denied 454 U.S. 1154 (1981),

reh'g. denied, 455 U.S. 983 (1982), held that the freedom of speech does not protect the right of student religious groups to meet on school premises. Thecourt in Brandon, decided prior to Widmar, supra, that public schools were not public forums available for the airing of religious doctrines. Even after Widmar, courts have had no difficulty in finding sufficient differences between high schools and colleges to justify prohibiting equal access to religious groups desiring to meet on public school property. Lubbock, supra.

Now, in the appellate court's decision in Williamsport, the Third Circuit has held that a public school can be a "limited public forum" and that to discriminate against a student group in

that forum because of the content of their speech, does raise free speech implications. Clearly, on this issue alone, a conflict has emerged between thecircuits which only this Court can resolve.

While the lower court opinion in this regard appears to be consonant with the congressional mandate in the Equal Access Act, any illusion of harmony between the legislative directive and judicial precedent dissolves in the court's holding that the establishment clause considerations outweigh the students' free speech rights and therefore, the school may constitutionally discriminate against religious groups.

3. Impressionability of school children.

As pointed out by Petitioner, the

decision below is not the first to carve out an exception to Widmar v. Vincent, supra, by holding that secondary school students unlike college students, are impressionable and unable to understand that a school board that allows religious clubs to meet in the school is not necessarily by that action endorsing the religious club. See, e.g., Lubbock, supra; Brandon, supra.

The lower court analyzed the facts at bar in light of the three-part test in Lemon v. Kurtzman, supra. It held that although there was a secular purpose in establishing the activities period, the "primary effect" of allowing religious groups to meet during that time would enhance religion. The court based its finding entirely on a belief that

secondary school students are impressionable and that the board would send a "message of government endorsement of religion" by permitting student religious groups to meet in the school.

On the issue of whether the impressionability of secondary age students should give rise to a different first amendment standard in determining whether a public forum exists, even the decisions of this Court may raise conflicting signals for school boards. For example, the decision below cites Board of Education v. Pico, 102 S.Ct. 2799 (1982) in support of its contention that Widmar does not apply at the secondary level, because at that level "emphasis is placed more on a structured program 'for inculcating fundamental values necessary to the maintenance of a

democratic political system.'" Petition for Certiorari Appendix at 17a.

However, the plurality opinion in Pico distinguished between first amendment constraints in the classroom where the school board could be said to have "unfettered discretion to inculcate community values" through the selection of textbooks, and the school library which is completely voluntary and where the choice of books is "entirely a matter of free choice" of the students. Board of Education v. Pico, supra at 2809. Although no definitive principles were annunciated in Pico, there is certainly support in the plurality opinion for the proposition that the "impressionability" standard does not apply outside the classroom, where students are engaged in purely voluntary activities.

While the circuit court decisions on equal access seem consistent in result, i.e. in upholding the refusal of school districts to grant permission to student religious groups to meet on public school premises, there in fact exist significant differences that warrant definitive resolution by this Court. In the instant case, the lower court emphasized that the "activities period" at issue occurred during the time when students are required to be in school. Petition for Certiorari at 28a and 43a, footnote 30.

Careful analysis of the decision indicates that it might have been different had the activities period been held before the school day begins. Other cases, however, have held the establishment clause to be implicated even when the religious meetings are held

before the school day begins. See, e.g., Brandon v. Board of Education of Guilderland Central Schools, supra. As indicated above, the Equal Access Act has done nothing to resolve this question, and may in fact only add legislative confusion to the judicial fray.

Perhaps more importantly, the lower court decision here, unlike the other cases finding establishment clause violations, recognizes a valid free speech right in permitting student religious groups to meet on public school property. Neither Brandon nor Lubbock, supra, confronted this Court with such a direct clash between the first amendment right to free speech and the constitutional prohibition against state establishment of religion. That this Court settle this confrontation has

become more urgent since the passage of the Equal Access Act.

CONCLUSION

School boards and school administrators are becoming used to treading narrow legal lines where the state of the law is less than clear. Through an excess of caution they can usually obey the law while accomplishing their educational mission. Here that may be impossible. Even were the case law completely clear, now that the Congress has passed a law enunciating a federal right, school people cannot defend a suit by a religious group which has been refused the right to meet on school grounds on the basis that extant case law prohibits that action. They must decide whether to risk violating the federal

statute, and thus risk a judgment for damages and attorneys' fees under 42 U.S.C. 1983 and 1988 or to comply with the statute and risk an injunction because of a court finding of an establishment of religion violation.

Whereas in the past religious groups may have been reluctant to file suits given the weight of the case law against them, the passage of the Equal Access Act may encourage them to file suit where school boards continue to follow judicial precedent. Until this Court definitively decides this issue or at least remands the case to the Third Circuit Court of Appeals for its reconsideration in light of the Equal Access Act, the law will

remain unclear to the benefit of no one, except perhaps attorneys.

Respectfully submitted,

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